UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

D. R. HORTON, INC.,	)	
and	)	Case 12-CA-25764
MICHAEL CUDA.	)	

AMICUS BRIEF OF PACIFIC LEGAL FOUNDATION
IN SUPPORT OF D. R. HORTON, INC.

DEBORAH J. LA FETRA
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: djl@pacificlegal.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Federal Statute

State Statute

Miscellaneous

Pursuant to the Board's Notice and Invitation to File Briefs (June 16, 2011), Pacific Legal Foundation respectfully submits this amicus brief in support of D. R. Horton, Inc.

INTEREST OF AMICUS

PLF was founded more than 35 years ago and litigates matters affecting the public interest at all levels of state and federal court, representing the views of thousands of supporters nationwide. Among other things, PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important cases involving contractual arbitration in both the consumer and employment context. *See*, *e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010); *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010); *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Preston v. Ferrer*, 552 U.S. 346 (2008); and *Circuit City Stores, Inc. v. Gentry*, 552 U.S. 1296 (2008).

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue presented is whether it is an unfair labor practice under Section 8(a)(1) of the National Labor Relations Act (NLRA) for an employment contract to contain a class action waiver as part of its arbitration provision.

Unlike collective bargaining agreements or the concerted action regulated under the NLRA, individual non-union employment contracts are governed by state law as any other contract. When those contracts contain an arbitration clause, however, federal substantive law of arbitration as reflected in the Federal Arbitration Act (FAA) comes into play. Under the FAA, employees and employers are free to contract for dispute resolution in any manner that they so desire, including individualized resolution without an option for aggregated claims in a class action or class arbitration

procedure. *AT&T Mobility v. Concepcion*, 131 S. Ct. at 1745. Because aggregation does not alter the substance of an underlying claim, and because arbitral resolution similarly does not alter the substance of an underlying claim (even claims based on federal statutes), employment contracts that require individual arbitration will be upheld.

Moreover, there is nothing inherently wrong or unfair with an employer requiring arbitration of work-related disputes. This outlook, which reflects congressional policy favoring arbitration, is codified in the FAA. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). Some job seekers may appreciate the benefits of arbitration; others may want to retain the right to go to court. Job seekers who place a high value on the ability to go to court should seek employment with an employer who does not require arbitration. Similarly, a job seeker who places a high value on the expressive nature of his sartorial style should not apply for a job that requires a uniform.

For these reasons, the Board should affirm that arbitration is an accepted method of alternative dispute resolution, and it is not an unfair labor practice for employers and workers to use it.

I

EMPLOYEES AND EMPLOYERS MAY CHOOSE TO ARBITRATE STATUTORY CLAIMS RELATED TO EMPLOYMENT CONDITIONS, WHETHER AS PART OF A COLLECTIVE BARGAINING AGREEMENT OR AN INDIVIDUAL EMPLOYMENT CONTRACT

The freedom of contract that animates the arbitration provisions in employment contracts governed by the FAA is a point of harmony, not conflict, with the underpinnings of the NLRA. "Judicial nullification of contractual concessions . . . is contrary to what the Court has recognized as 'one of the fundamental policies' of the National Labor Relations Act—freedom of contract." *Nat'l Labor Relations Bd.* v. *Magnavox Co. of Tenn.*, 415 U.S. 322, 328 (1974) (citation omitted)

(Stewart, J., concurring in part and dissenting in part), *cited in 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1465 (2009). The freedom to make and enforce contracts is a fundamental element of free choice and ought to be protected for that reason. *See*, *e.g.*, *Advance-Rumely Thresher Co., Inc. v. Jackson*, 287 U.S. 283, 288 (1932) ("[F]reedom of contract is the general rule and . . . [t]he exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."); *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931) ("The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts."). Freedom of contract cannot be construed as an unfair labor practice.

A. The NLRA Does Not Govern Individual Employment Contracts

Contracts between individual employers and non-unionized employees do not come within the purview of the NLRA. The concerted action provisions of the NLRA deal solely with an employee's right to participate in union organizing activities. *See* 29 U.S.C. § 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . ."), and *New Negro Alliance v. Sanitary Grocery Co*., 303 U.S. 552, 554 (1938) (applying the Norris-La Guardia Act to a picketing case). Of course, within this union context, arbitration plays a key role, demonstrating that arbitration, per se, is favored as a means of dispute resolution. *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549 (1964) (noting "the central role of arbitration in effectuating national labor policy"); *see also Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 861 (9th Cir. 1979) (describing "the strong policy favoring arbitration of labor disputes").

With the exception of arbitration clauses covered by the FAA, discussed below, individual employment contracts, in general, are not governed by any federal law at all—they are governed instead by state law. *See Stearns v. NCR Corp*., 297 F.3d 706, 710 (8th Cir. 2002) ("In general, an

employment contract between an employer and a non-union employee is governed by state law, not by . . . the federal labor laws."). *Cf. Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987) (Section 301 of the NLRA governs claims "founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.' . . . Section 301 says nothing about the content or validity of individual employment contracts.") (citations omitted).

B. The FAA Applies to Independent Employment Contracts, Even in Cases Involving Statutory Claims

To the extent that an employment contract contains an arbitration clause, the FAA provides special protection as a matter of substantive federal law, reflecting congressional favor of this form of alternative dispute resolution. *Preston v. Ferrer* 552 U.S. at 349 ("The Act, which rests on Congress' authority under the Commerce Clause, supplies not simply a procedural framework applicable in federal courts; it also calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration."). *See also AT&T Mobility*, 131 S. Ct. at 1745 ("Section 2 reflects a 'liberal federal policy favoring arbitration,' *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 [(1983)], and the 'fundamental principle that arbitration is a matter of contract,' *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 [(2010)])." The FAA generally applies to contracts of employment except those involving "transportation workers." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

As such, employees and employers may agree to resolve wage-and-hour and other statute-based disputes in arbitration. In *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1367 (11th Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006), the plaintiff asserted a Fair Labor Standards Act (FLSA) wage claim against her employer, arguing that a binding arbitration provision in her

employment contract was unconscionable because it precluded class actions. *Id.* The Eleventh Circuit rejected that argument, on the principle that "the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition.'" *Id.* (citation omitted); *see also Slawienski v. Nephron Pharm. Corp.*, No. 1:10-CV-0460-JEC, 2010 U.S. Dist. LEXIS 130365, at *4-*5 (N.D. Ga. Dec. 9, 2010) (plaintiffs pursuing FLSA claims in an attempt to collect allegedly unpaid overtime wages are bound by arbitration, notwithstanding argument that mandatory arbitration was an unfair labor practice under the NLRA); *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 377 (6th Cir. 2005) (statutory claims may be the subject of an arbitration agreement, including claims under the FLSA); *Winn v. Tenet Healthcare Corp.*, No. 2:10-CV-02140-JPM, 2011 U.S. Dist. LEXIS 8085, at *2 & n.2 (W.D. Tenn. Jan. 27, 2011) (finding FLSA claim subject to arbitration and collecting cases reaching same conclusion).

The Supreme Court has considered the interaction of the FAA with other federal statutes that provide substantive causes of action, and in each case, so long as the aggrieved person can pursue her claim in arbitration, there is no diminution in the substantive rights offered by the other statutes. *See Circuit City*, 532 U.S. at 123 (arbitration required of claims arising out of California's Fair Employment and Housing Act and state common law tort claims); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (federal age discrimination claim was arbitrable); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (antitrust claims arising out of the Sherman Act are arbitrable). For example, in *Gilmer*, 500 U.S. at 23, the Court considered whether a claim under the Age Discrimination in Employment Act of 1967 (ADEA) could be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application. The Court upheld the arbitration agreement, finding that nothing in the text of the ADEA forbade

resolution by arbitration, and that such resolution presented no inherent conflict with the purposes of the ADEA. *Id.* at 26.[1] Importantly, the Court held that the employee retained the option of filing a complaint with the Equal Employment Opportunities Commission. *Id.* The administrative path, as in this case, was untouched by the arbitration contract.[2] *See also Bender v. A.G. Edwards & Sons, Inc*., 971 F.2d 698, 700 (11th Cir. 1992) (sexual harassment claims under Title VII are arbitrable); *Weeks v. Harden Mfg. Corp*., 291 F.3d 1307, 1313 (11th Cir. 2002) ("Courts have consistently found that claims arising under federal statutes may be the subject of arbitration agreements and are enforceable under the FAA.").

The Court similarly held that arbitration contracts in the employment context presented no conflict with the Sherman Act, the Securities Exchange Act of 1934, the Racketeering Influenced and Corrupt Organizations Act, and the Securities Act of 1933. The bottom line is that "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Mitsubishi Motors*, 473 U.S. at 637 (addressing the Sherman Act); *see also Circuit City*, 532 U.S. at 123 ("The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law; as we noted in *Gilmer*, 'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits

---

[1] *Cf. Bailey v. Ameriquest Mortg. Co.*, 346 F.3d 821, 823 (8th Cir. 2003) ("The [United States Supreme] Court upheld the arbitrability of federal age discrimination claims in *Gilmer* . . . and the age discrimination statute there at issue had borrowed its remedial provisions from the previously enacted FLSA.")

[2] *Cf. Preston*, 552 U.S. at 359 ("When parties agree to arbitrate all questions arising under a contract, the FAA supersedes *state laws* lodging primary jurisdiction in another forum, whether judicial or administrative." (emphasis added)).

to their resolution in an arbitral, rather than a judicial, forum.'" (citation omitted)); *Shearson/American Express v. McMahon*, 482 U.S. 220, 222 (1987) (arbitration upheld with regard to Securities Act of 1934 and RICO claims); *Rodriguez de Quijas v. Shearson/American Express, Inc*., 490 U.S. 477, 481 (1989) (upholding arbitration of claims arising under the Securities Act of 1933). Thus, arbitration of Mr. Cuda's wage claims falls squarely within existing case law as a legitimate method of dispute resolution.

II

NLRB IMPOSITION OF COLLECTIVE ADJUDICATION, WHEN INDIVIDUAL ARBITRATION IS AGREED TO, WOULD BE THE TRUE UNFAIR LABOR PRACTICE

A. Individual Arbitration Offers Full Relief for Statutory Claims

In the cases cited above in Section I.B., the Supreme Court upheld arbitration of statutory claims because the individual resolution of those claims in arbitration provides full relief to claimants. This premise follows from the general rule regarding collective adjudication: Aggregating claims in a class action or class arbitration does not alter the substantive law underlying the lawsuit. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) ("Rule 23's requirements must be interpreted in keeping with . . . the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'" (citation omitted)); *Alabama v. Blue Bird Body Co., Inc.*, 573 F.2d 309, 318 (5th Cir. 1978) ("Just as the meaning of liability does not vary because a trial is bifurcated, the requisite proof also in no way hinges upon whether or not the action is brought on behalf of a class under Rule 23 . . . . Consequently, this court has no power to define differently the substantive right of individual plaintiffs as compared to class plaintiffs."); *Windham v. Am. Brands, Inc*., 565 F.2d 59, 66 (4th Cir. 1977) ("Generalized or class-wide proof of damages in a private anti-trust action would, in addition, contravene the mandate

of the Rules Enabling Act that the Rules of Civil Procedure 'shall not abridge, enlarge or modify any substantive right.'" (footnote omitted)); *see also* James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 Hofstra L. Rev. 329, 329 (2005) ("[W]hile class actions sacrifice individual autonomy in collective claiming processes to achieve consistent outcomes and economies of scale, the underlying claims remain individual in nature.").

In enacting the FAA, Congress' primary concern was resolution of individual claims: "[T]he FAA's legislative history indicates that Congress was opening the door to a particular *kind* of non-judicial dispute resolution proceeding, and class arbitration is a different kind of proceeding—apart from its non-judicial nature, it has little in common with what Congress approved in 1925." David S. Clancy & Matthew M. K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55, 57 (Nov. 2007) (emphasis in original). In this regard, congressional testimony by FAA proponents described arbitration as "face to face" in nature and prompt, inexpensive, and procedurally streamlined. *Id*. at 59-60. Arbitrations followed this individual model for most of their existence.

B. In Stark Contrast to Individual Arbitration, Class Arbitration Creates More Problems Than It Solves

Class arbitration simply did not exist until very recently, *AT&T Mobility*, 131 S. Ct. at 1751, and is generally considered an awkward hybrid procedure. "Courts addressing the concept of class actions in arbitration have largely contemplated a continued, significant judicial role in overseeing key aspects of the class arbitration under a hybrid approach, in order to protect the rights of the absent members." Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 Wm. & Mary L. Rev. 1711, 1764 & n.224 (2006) (citing *Izzi v. Mesquite Country Club*, 231 Cal. Rptr. 315, 322 (1986) (acknowledging a hybrid class arbitration procedure

whereby a court certifies a class and then orders an arbitration to proceed on a classwide basis); *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 861 (Pa. Super. Ct. 1991) ("[W]e find that this class action, if properly certified, may continue through arbitration on a class-wide basis. We therefore remand to the trial court for class certification proceedings. After this ruling, the trial court must compel arbitration.").

In response to this new hybrid procedure, the Supreme Court has issued important guidance to lower tribunals as to how class arbitration procedures should be viewed in relation to traditional, individual arbitration. Where parties have contracted for individual arbitration, imposing class arbitration effects a "fundamental change" to the parties' agreement. *Stolt-Nielsen*, 130 S. Ct. at 1776. Class arbitration "no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties," including absent parties. *Id.* The parties' expectations about privacy and confidentiality in individual arbitration are also "potentially frustrat[ed]" when disputes are litigated on a class-wide basis. *Id.* Perhaps most critically, class arbitration drastically raises the stakes "even though the scope of judicial review is much more limited." *Id.*; *see also* Linsday R. Androski, *A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses*, 2003 U. Chi. Legal F. 631, 649 (class procedure "subjects arbitration to the very judicial burden that the contracting parties sought to avoid through arbitration").

Most recently, in *AT&T Mobility v. Concepction*, 131 S. Ct. at 1748, the Court held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." The Supreme Court distinguished class arbitration from individual arbitration on both structural and policy grounds. As a structural matter,

> [c]lasswide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties.

AT&T Mobility, 131 S. Ct. at 1750. The Court then identified three policy reasons why class arbitration not only should not be imposed upon non-consenting parties, but why class arbitration in general is an inferior method of dispute resolution than individual arbitration: First, class arbitration is "slower, more costly, and more likely to generate procedural morass." *Id.* at 1751. Second, class arbitration *requires* procedural formality if members of the class are to be bound by the result. These procedural formalities would have to include requirements that "class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class." *Id.* (citing *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811-12 (1985)). Third, class arbitration greatly increases risks to defendants because the absence of multilayered review makes it more likely that errors will go uncorrected. *Id.* at 1752. That is, if an arbitrator errs in the resolution of an individual employee's claim, defendant companies can accept that potential cost; but if the error occurs in a case involving potentially tens of thousands of employees with aggregated claims, the defendant companies will be pressured into settling questionable claims rather than bet the company on the outcome of the essentially unreviewable arbitration. *Id.* (citing *Kohen v. Pac. Inv. Mgmt. Co. LLC & PICO Funds*, 571 F.3d 672, 677-78 (7th Cir. 2009)) (describing the risk of "in terrorem" settlements in class actions).

C. Empirical Studies Show That Individual Arbitration Has Fair Results

Suspicion against an arbitral forum is unwarranted, just because arbitration operates under procedures that differ from court rules. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1471 (2009) ("[T]he recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration."). There is, moreover, no evidence that arbitration is worse than litigation at achieving just results. What little empirical work has been done suggests that arbitrators decide cases much as judges do, and without the distortions common in cases tried to juries. Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. Disp. Res. 469, 480 n.86 (citing Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 Law & Contemp. Probs. 105, 107 (2004)).

In fact, studies show that "plaintiffs do not fare significantly better in litigation, that arbitration provides a quicker resolution than litigation, and that available data do not indicate whether damages are fairer under either system." *The New Judicial Hostility*, 2006 J. Disp. Res. 480-81 n.87 (citing David Sherwyn, *et al.*, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1564 (2005)). *See also* Michael H. LeRoy & Peter Feuille, *Happily Never After: When Final and Binding Arbitration Has No Fairy Tale Ending*, 13 Harv. Negot. L. Rev. 167, 184 (2008) (discussing a survey of employment arbitrations where "[e]mployees won more often in arbitration than similar plaintiffs in court"); Michael H. LeRoy, *Getting Nothing for Something: When Women Prevail in Employment Arbitration Awards*, 16 Stan. L. & Pol'y Rev. 573, 589-90 (2005) (finding that female employees prevailed in arbitration much more often than similarly situated women in litigation, though the amounts of the awards were

lower). Thus, some employees may affirmatively prefer to resolve their claims in arbitration. *See* Michael Z. Green, *Tackling Employment Discrimination with ADR: Does Mediation Offer a Shield for the Haves or Real Opportunity for the Have-Nots?*, 26 Berkeley J. Emp. & Lab. L. 321, 327-30 (2005) (suggesting benefits for employees in pursuing arbitration given the harsh results presented by the court system). Under these circumstances, it cannot be deemed "unfair" for employees to arbitrate employment disputes on an individual basis and, therefore, it is not "unfair" for employees and employers to contract for that specific, individual method of arbitration.

The fact that collective adjudication can neither expand nor contract substantive claims, combined with the serious due process concerns implicated by class arbitration under any circumstances, overlaid with the undisputed fact that a contract exists between the parties in this case agreeing to settle their disputes by individual arbitration, and buttressed by the ultimate fair results that come out of arbitration leads to the conclusion that the parties bargained for and must be held to individual arbitration of claims.

III

AN EMPLOYER'S REQUIREMENT OF INDIVIDUAL ARBITRATION OF WORKPLACE DISPUTES SHOULD BE VIEWED IN THE SAME MANNER AS ANY OTHER POTENTIAL TRADE-OFF

The FAA directs courts to place arbitration agreements on equal footing with other contracts, and it "does not require parties to arbitrate when they have not agreed to do so." *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 293 (2002). Meanwhile, people do not have any fundamental right to work for a specific employer. *See Vance v. Bradley*, 440 U.S. 93, 96-97 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *Kubik v. Scripps College*, 118 Cal. App. 3d 544, 549 (1981) (upholding mandatory retirement for university

professors in part because "there is no fundamental right to work for a particular employer, public or private"). Thus, in looking for a job, applicants will consider the various perceived benefits and burdens of each particular employment opportunity.

While Congress demands a neutral view of the availability of arbitral remedies, individual job applicants may perceive arbitration (or other alternative dispute resolution procedures) favorably or unfavorably. *See* Ellis B. Murov & Beverly A. Aloisio, *Arbitration of Employment Disputes Before and After Circuit City*, 17 Lab. Law. 327, 343 & n.151 (2001) (noting questions of bias where employers are repeat players in arbitration, and further noting that unions also are repeat players, representing workers under collective bargaining agreements); *see also* Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 Ohio St. J. on Disp. Resol. 303, 339 (1998) (Reporting study of construction industry arbitration, that "[w]hen it came to perceived fairness in decisionmaking, arbitrators generally compared favorably with judges and juries. On average, moreover, arbitration was a speedier means of dispute resolution than either jury trial or bench trial, and somewhat less costly overall." (internal citations omitted)). In this way, an arbitration requirement is no different than many other job requirements that impact individual preferences, and even legally protected rights.

When contemplating where to work, people have to consider all manner of trade-offs. Some employers offer shifts that start very early in the morning, on weekends, or extend quite late at night.[3] Employers may require workers to wear uniforms[4] or costumes,[5] refrain from certain personal

---

[3] *See*, *e.g.*, *Opuku-Boateng v. Cal.*, 95 F.3d 1461, 1465 (9th Cir. 1996) ("[A]ll employees . . . were required to work 'an equal number of undesirable weekend, holiday, and night shifts.'" (citation omitted)); *Nat'l Labor Relations Bd. v. Or. Steel Mills, Inc.*, 47 F.3d 1536, 1540 (9th Cir. 1995) ("Store clerks are required to work both nights and weekends.").

[4] *See*, *e.g.*, *Immigration and Naturalization Serv. v. Federal Labor Relations Authority*, 855 F.2d
(continued...)

adornments,[6] or stick to a script when speaking to customers.[7] Some employers demand a heavy travel schedule[8] or require workers to report for duty on holidays.[9] Potential workers weigh the trade-offs of various places of employment every day, accepting some offers and declining others.[10]

A job applicant who disdains arbitration as a dispute resolution mechanism can look for work with employers who do not make arbitration a requirement of employment. *See Marin Storage &*

---

[4] (...continued)
1454, 1464 (9th Cir. 1988) (holding that INS employees are required to wear uniforms and could be forbidden to wear union insignia pins (or any other adornment) on those uniforms); *Dawson v. Nev.*, 825 P.2d 593, 596 (Nev. 1992) (identifying crime victim because she "wore a blue Stop 'N' Go shirt as part of her work uniform").

[5] *See*, *e.g.*, Cal. Gov't Code § 12947.5(b)(c); *Hill v. Moskin Stores, Inc.*, 159 A.2d 299, 300 (Del. Super. 1960) (porter required to wear "snowman" costume and pass out candy to children outside the store).

[6] *See Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 135-36 (1st Cir. 2004), *cert. denied*, 545 U.S. 1131 (2005) (finding that it would constitute an undue hardship to require Costco to modify its no-facial-jewelry policy as a reasonable accommodation for an employee who claimed membership in the Church of Body Modification, given Costco's determination that facial piercings detract from the "neat, clean and professional image" that it aimed to cultivate).

[7] Scripted communications are standard practice in the telecommunications industry. *See* Patrick E. Michela, Comment, *"You May Have Already Won...": Telemarketing Fraud and the Need for a Federal Legislative Solution*, 21 Pepp. L. Rev. 553, 560 (1994) ("[T]elemarketers encourage, or sometimes require, fronters to read verbatim from a script provided by the telemarketer that is designed to induce the customer to buy the product or service being offered. A typical script allows the recipient of the phone call to ask questions and provide certain information to the salesperson. The script provides the fronter with different messages to read depending on the customer's responses to the questions posed by the fronter." (citations omitted)).

[8] *See Goicoechea v. Mountain States Tel. and Tel. Co.*, 700 F.2d 559, 560 (9th Cir. 1983) (company could fire cable splicer who refused to comply with requirement of extensive travel).

[9] These would include such public service industries as police officers, *Perry v. Ft. Lauderdale*, 352 So. 2d 1194, 1195 (Fla. App. 1977), firefighters, *Miami v. Gioia*, 215 So. 2d 780, 782 (Fla. 1968), and hospital workers, *Washington Hosp. Center v. Service Employees Int'l Union Local 722, AFL-CIO*, 746 F.2d 1503 (D.C. Cir. 1984).

[10] The State of Florida facilitates such comparisons by providing a wealth of career opportunity information online. *See* State of Florida Agency for Workplace Innovation, http://www.labormarketinfo.com/ (last visited July 4, 2011).

Trucking, Inc. v. Benco Contracting & Engineering, Inc., 89 Cal. App. 4th 1042, 1056 (2001) (noting, in discussion of extremely limited procedural unconscionability, that plaintiff could take his business elsewhere if he did not like the contract terms one vendor provided). Class action arbitration waivers have been adopted by some companies, but they are far from universal. *See* Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in Publicly-Held Companies' Contracts*, 56 DePaul L. Rev. 335, 348 (2007). Professors Eisenberg and Miller studied contracts made by 2,858 publicly held companies during a seven-month period in 2002, including 111 specifically identified "employment contracts." Of the grand total, about 89% do *not* mandate arbitration, *id.* at 350, and about 63% of the employment contracts did *not* mandate arbitration. *Id*.

Employers may require a particular type of dispute resolution, but as a practical matter, this is no different than other aspects of employment that are not open to negotiation. For example, employers may offer a particular 401(k) matching plan, or a specific type of health insurance. These aspects of employment are mandated by the employer and a potential employee who is looking for a particular benefits package may have to shop around or may simply conclude that the ideal package is unavailable in his market. In viewing the wide variety of trade-offs that exists in the acceptance of any job, an individual who highly values class-based dispute resolution, or who does not want to arbitrate workplace disputes at all should not apply to work at D. R. Horton.

CONCLUSION

Individual employment contracts containing arbitration provisions are governed by the Federal Arbitration Act, not the National Labor Relations Act. The United States Supreme Court

and scores of lower courts have upheld the validity of arbitration provisions that require individual resolution of disputes, rather than aggregation of claims. Mr. Cuda's collateral attack on these holdings, by invoking the "unfair labor practice" provision of the NLRA, is unrelated to the substantive federal law of arbitration, finds no basis in the law, and should be rejected.

DATED: July 19, 2011.

Respectfully submitted,

DEBORAH J. LA FETRA

Counsel for Amicus Curiae Pacific Legal Foundation

CERTIFICATE OF SERVICE

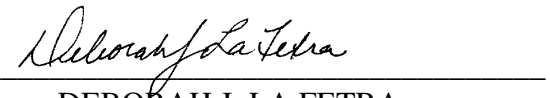
I hereby certify that the AMICUS BRIEF OF PACIFIC LEGAL FOUNDATION was duly served upon the following individuals by electronic transmittal on July 19, 2011.

Hon. Lester Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570-0001
mynlrb.nlrb.gov/efile

Michael Cuda
5124 Ivory Way
Melbourne, FL 32940
mikec@condevhomes.com

John F. King
National Labor Relations Board, Region 12
Miami Resident Office
51 S.W. 1st Avenue, Suite 1320
Miami, FL 33130
John.King@nlrb.gov

Mark M. Stubley
Bernard P. Jeweler
Ogletree, Deakins, Nash, Smoak & Stewart, PC
P.O. Box 2757
Greenville, SC 29602
Mark.stubley@ogletreedeakins.com
Bernard.jeweler@ogletreedeakins.com



DEBORAH J. LA FETRA